

Narrative in the Legal Text: Judicial Opinions and Their Narratives^{*}

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Narrative is essential to numerous aspects of legal practice and writing, from pleading and negotiation to the interpretation of evidence and conflict resolution. Indeed, one of the earliest senses of *narrator* in English, dating from the thirteenth century, refers to a pleader or sergent-at-law tasked with reciting a party's statement.¹ Yet the law's most familiar and characteristic mode of written expression, the judgment, lacks two of the key ingredients that contribute to the lure of literary narrative – namely, the drive, fueled by uncertainty and anticipation, that propels readers on toward the conclusion, and the pleasure of observing and reflecting on others' mental states, which accounts for a considerable part of fiction's cognitive appeal.² The absence of these features should alert us to the questionable premises underlying any treatment of the judgment as simply one more form of narrative, whose fundamental similarity to novels and films can be taken for granted.

^{*} For invaluable comments on earlier drafts, thanks to Andrew Bricker, Peter Brooks, Monika Fludernik, Catherine Gallagher, Suzanne Keen, Jim Phelan, and Bob Spoo.

¹ Paul Brand, "The language of the English legal profession: The emergence of a distinctive legal lexicon in insular French" in Richard Ingham (ed.), *The Anglo-Norman Language and Its Contexts* (York: York Medieval Press, 2010), pp. 94–101, 97. For an excellent theoretical discussion, see A.C. Spearing, "What is a narrator? Narrator theory and medieval narratives," *Digital Philology*, 4 (2015), 59–105, 67, which notes that in this usage, the narrator is external to the story, "unlike the narrator of modern theory." An external narrator/pleader was strategically desirable, for litigants, because "his words [would] not bind the client until that client . . . adopted them," thus allowing for "two chances of pleading correctly" instead of the single chance that a first-person narrative would allow. Sir Frederick Pollock and Frederic William Maitland, *The History of English Law before the Time of Edward I*, 2 vols. (Cambridge, UK: Cambridge University Press, 1895), vol. I, p. 191.

² On the ways in which plot and character conspire to allure the reader, see, e.g., David Herman, *Story Logic: Problems and Possibilities of Narrative* (Lincoln, NE: University of Nebraska Press, 2002); Ross Chambers, *Story and Situation: Narrative Seduction and the Power of Fiction* (Minneapolis, MI: University of Minnesota Press, 1990); Lisa Zunshine, *Why We Read Fiction: Theory of Mind and the Novel* (Columbus, OH: Ohio State University Press, 2006).

Narrative, in law, is typically harnessed for the purpose of argument, rather than serving as an end in itself. Sometimes lawyers can achieve that goal by *presenting* a story as an end in itself, and sometimes narrative is not subordinated in this way because it is embedded in the structure of a legal process, such as a trial.³ To say that a trial is a narrative, however, conveys little about the narrative aspects of a trial judge's decision or any appellate decisions, which seek only to represent certain aspects of the trial for explicit legal ends, such as justifying a finding of liability or showing why a doctrine needs to be modified. Legal decisions offer a prime example of an argumentative form that uses particular narrative resources to advance a set of contentions. In using narrative (as in using rhetoric), judges may be inept or may inadvertently undermine their own aims, but the result is no likelier to yield an engrossing plot. A reader on the lookout for more examples of the judge's blunders has the same kind of analytical distance as a reader who evaluates and accepts the judge's arguments, and both are very different from the reader who is immersed in a story, drawn to its characters, and curious about their fates.

By recognizing that judgments are, in important ways, *unlike* literary narratives, we can gain a better understanding of the features that make judgments narratively distinctive. In what follows, I take a few basic narrative concepts and show how they can suggest new ways of thinking about judgments. First, I comment briefly on the place of narrative studies in legal scholarship, noting that despite its seemingly interdisciplinary orientation, this line of research rarely takes up the questions that narratologists ask. Next, I turn to the narrative qualities of judicial opinions, suggesting that we may consider them as including two related stories: a story about the events leading up to the litigation (the factual story) and the story of its doctrinal resolution (the legal story).⁴ These stories often blend; my aim is simply to show how distinguishing them, if only provisionally, alerts us to narratively significant aspects of the judgment that may otherwise escape notice. The work of Todorov and Ricoeur can help to clarify what it means to talk about a plot, in these two stories. Todorov's definition of a plot involves a disturbance to an equilibrium, and this requirement suggests that the treatment of legal issues, in some decisions, is plotless. Ricoeur's concept of "quasi-plot," for certain types of narratives with an

³ For a helpful discussion of the trial's narrative qualities, see Robert Weisberg, "Proclaiming trials as narratives: Premises and pretenses" in Peter Brooks and Paul Gewirtz (eds.), *Law's Stories: Narrative and Rhetoric in the Law* (New Haven and London: Yale University Press, 1996), pp. 61–83.

⁴ The analytical section often includes stories about how certain doctrines were created or modified; those narratives would also reward study, but I focus here on narrative features of the analysis in general, regardless of whether it includes doctrinal biographies.

explanatory orientation, offers a means of specifying more precisely what counts as event and character in the decision's legal story; accordingly, this concept allows us to consider how we might read legal cases with an eye to the questions that figure most prominently in the study of narrative – namely, questions concerning the relations between narrator, story, character, and reader.

In the last section, I consider some legal uses of what Barthes calls the “reality effect” – the means by which realist fiction authenticates itself. Seemingly superfluous details, Barthes argues, are included so that they may attest to their own (and the text's) verisimilitude. This idea offers a means of understanding both the extraneous details that arise in the pretrial stages of litigation and the process by which they disappear when those stages end. The shift toward increasingly formal and technical language, with a well-defined structure in which factual details are attached to legal conclusions, reveals an economy of narrative energy that governs the adjudication process. Most of the features that make law narratively compelling belong to the pretrial and trial stages; the ensuing written decisions transpose some of those features into the legal analysis, where their ability to immerse us in the story is purged away, but some of their other functions remain.

Scholarship on law and literature often speaks vaguely about narrative in ways that imply a basic commonality among its legal and literary manifestations. To ask how legal decisions use narrative in a distinctive fashion is not to foreclose this kind of inquiry, but to allow for more precision in exploring both the similarities and differences, opening up an array of new questions about plot and character, and about the law's designs on the reader.

NARRATIVE IN LEGAL SCHOLARSHIP

Although the turn to narrative is hardly a recent development in legal scholarship, this approach has been largely confined to a few areas (e.g., trial advocacy, “outsider” jurisprudence, and occasionally topics such as search and seizure, and the “grand” narratives of constitutional law).⁵ Moreover, the

⁵ For an overview on the research on law and narrative generally, see Greta Olson, “Narration and narrative in legal discourse,” in Peter Hühn et al. (eds.), *Handbook of Narratology*, 2nd ed. (Berlin: de Gruyter, 2014), vol. I, pp. 371–383. For helpful discussions of the uses that narrative has served in legal scholarship, see the essays in Brooks and Gewirtz (eds.), *Law's Stories*; Jane Baron and Julia Epstein, “Is law narrative?” *Buffalo Law Review* 45 (1997), 141–187; Jane Baron, “Law, literature, and the problems of interdisciplinarity,” *Yale Law Journal*, 108 (1999), 1059–1085, 1066–1071; Julie Stone Peters, “Law, literature, and the vanishing real,” *PMLA*, 120 (2005), 442–453, 446–448; Bernadette Meyler, “The myth of law and literature,” *Legal Ethics*, 8 (2005), 318–325.

concept of narrative at work in these discussions remains thin, and rarely considers such basic questions as whether or not the narrator is a character in the story, what kind of access the reader is given to the various characters and events, and what determines the order in which the events are presented. In many instances, these questions would suggest new lines of inquiry that could complement and refine the more conventional doctrinal analysis of the cases under discussion. In other instances, these questions go unasked because they simply do not apply. To recognize that is to see that legal scholars often speak of “narratives” when they mean something else – such as images, conceptions, representations, or ideologies. Frequently, the label means simply that an interpretation is about to follow – the implication being that only narratives call for interpretation, but once the license to interpret has been secured, questions of narrative do not command any further interest. Some forms of interdisciplinary scholarship draw on methods from different fields, and other forms go outside the home discipline for the topic of inquiry rather than for the method; research on law and narrative has tended more toward the latter form, when it attends to narrative at all.

This state of affairs is unfortunate, because some of the key concepts in narratology bear on familiar debates among legal theorists. For example, scholars have long argued over the roles of subjectivity and objectivity in legal analysis and decision-making, and have drawn on various disciplines to explore these issues, but have not asked whether narrative understandings of subjectivity in language could have anything to contribute. One might think that the textual and linguistic manifestations of subjectivity could shed light on how judges actually describe and apply objective and subjective standards. This absence is all the more remarkable because the “reasonable person” is a typical means of expressing those standards; if that figure were not so ubiquitous as to be taken for granted, the personification itself would alert us to the need for narrative inquiry.⁶ Most legal standards avoid personification, relying instead on abstractions like “undue burden,” “originality,” and “rational basis,” which strive for objectivity by shunning the human element in their mode of assessment. Legal commentators routinely acknowledge the oddness

⁶ The concept of subjectivity in language was originally formulated to describe “the capacity of a speaker to posit himself as a ‘subject,’” which “creates the category of person.” Emile Benveniste, “Subjectivity in language,” *Problems in General Linguistics* (Princeton, NJ: Princeton University Press, 1971), p. 224. Thus the very use of the “reasonable person” as the instrument for representing a standard helps to show why Benveniste’s concept might have legal significance. For classic discussions of its implications for narrative, see Ann Banfield, *Unspeakable Sentences: Narration and Representation in the Language of Fiction* (London: RKP, 1982); Monika Fludernik, *The Fictions of Language and the Languages of Fiction* (London: Routledge, 1993).

of the personification by referring to the reasonable person as a “character,” but have not taken the seemingly obvious step of asking how this figure resembles and differs from the characters that populate literary narratives, nor what the narrative functions of characters might tell us about this one.⁷

Again, although counterfactuals play a significant role in work on legal argumentation and the modeling of legal logic, the narrative study of counterfactuals has yet to inform this area of research. The corpus of textual examples involving legal counterfactuals consists mainly of material taken from cases, not material used in legal advocacy. Without resort to narrative concepts, these two kinds of sources appear identical, but a quick glance shows how different they are. Consider *Worldwide Volkswagen Corporation v. Woodson*,⁸ in which the US Supreme Court refused to extend the reach of constitutionally permissible “long-arm” jurisdiction to situations in which the defendant’s products would foreseeably find their way into another jurisdiction:

If foreseeability were the criterion, a local California tire retailer could be forced to defend in Pennsylvania when a blowout occurs there, see *Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc.*, 239 F.2d 502, 507 (CA4 1956); a Wisconsin seller of a defective automobile jack could be haled before a distant court for damage caused in New Jersey, *Reilly v. Phil Tolkani Pontiac, Inc.*, 372 F.Supp. 1205 (N.J.1974); or a Florida soft-drink concessionaire could be summoned to Alaska to account for injuries happening there, see *Uppgren v. Executive Aviation Services, Inc.*, 304 F.Supp. 165, 170–171 (Minn.1969). Every seller of chattels would in effect appoint the chattel his agent for service of process. His amenability to suit would travel with the chattel.⁹

Taken at face value, each *could* invites the reader to entertain the possibility featured in the ensuing scenario, serving precisely the future-oriented, hypothesis-positing function that the legal commentary on counterfactuals typically explores. In fact, the text does no such thing: the citations serve, rhetorically and narratively, to foreclose the option in question by pointing the reader to a case that has already rejected that possibility.

We might consider this pattern in terms of Gerald Prince’s work on “dis-narrated” events – “events that *do not* happen, but, nonetheless, are referred to

⁷ However, some literary critics have helpfully explored this idea; for an extremely lucid and provocative discussion, see Elizabeth Fowler, *Literary Character: The Human Figure in Early English Writing* (Ithaca: Cornell University Press, 2003), pp. 24–26; see also my comments in “Law and literature,” in Markus Dirk Dubber (ed.), *The Oxford Handbook of Criminal Law* (Oxford, UK: Oxford University Press, 2014), pp. 111–130, 129–130.

⁸ 444 U.S. 286 (1980). ⁹ *Ibid.* at 296.

(in a negative or hypothetical mode) by the narrative text.”¹⁰ Prince associates certain uses of disnarration with realism (the story rejects far-fetched possibilities to underscore the accuracy of its representations) and with the conditions of tellability itself (the disnarrated is excluded because it would not have generated a plot worth reading).¹¹ That explanation suggests, by way of analogy, that the Court’s disnarrations do not simply refer to what has been repudiated, but also heighten the desirability of the chosen path, which slots the doctrine into a plot that leads somewhere in a legally plausible world – one that is both created and made realistic through contrast with these narrative refusals. That use of the counterfactual differs markedly from one in which competing alternatives are made to sound plausible. Of course, disnarration can gesture toward genuine possibility, as Prince also notes; it is only by contrasting these effects that we can appreciate the different functions of hypotheticals in advocacy and in legal decisions, rather than treating them all as equivalent.

The examples of the reasonable person and the counterfactual suggest two ways of considering how legal decisions incorporate narrative features. First, narrative logic seeps into judicial opinions because it informs various doctrines and the processes of adjudication generally, and judges repeat the same logic when they apply these doctrines and participate in these processes. Second, in mundane ways that can nevertheless have great significance, judicial decisions follow certain narrative conventions and use narrative techniques as means of advancing an argument. Much of the existing research on law and narrative – not all of it expressly presented under that heading – takes the first approach, addressing the narrative logic of law writ large, where the “legal” of “legal narrative” includes doctrines, processes of analysis, and modes of interpretation. Exploring the temporal paradoxes of *retrospective* prophecy, Peter Brooks has shown how the narrative logic of a completed search can foreclose other possible stories about what the search yielded, and has considered the interpretive, evidentiary, and doctrinal manifestations of this logic.¹² Relatedly, David Velleman has argued that the satisfaction created by a fitting conclusion can beguile us into crediting a story, leading us to accept too readily that it has achieved its explanatory aims.¹³ Several recent discussions have considered the ways in which the perspective of the omniscient narrator underpins certain aspects of the law of search and seizure, and

¹⁰ Gerald Prince, “The disnarrated,” *Style*, 22 (1988), 1–8, 2. ¹¹ *Ibid.*, 5.

¹² Peter Brooks, “Inevitable discovery—Law, narrative, retrospectivity,” *Yale Journal of Law & the Humanities*, 15 (2003), 71–102; Peter Brooks, “Narrative transactions—Does the law need a narratology?” *Yale Journal of Law & the Humanities* 18 (2006), 1–38.

¹³ J. David Velleman, “Narrative explanation,” *Philosophical Review*, 112 (2003): 1–25.

bears on the principles of statutory interpretation.¹⁴ Again, the integrated pattern of an internally consistent and adequately developed story informs various accounts of “narrative coherence” as a criterion for legal fact-finding and analysis: paraphrasing Stanley Fish, we may say that the most successful trial narrative or interpretation of a precedent will be the one that does the most work in explaining and assigning meaning to the details vying for legal significance.¹⁵ The defendant who can ascribe the stray footprint at the crime scene to a rival will do better than the one who can only say, “I was framed.”¹⁶

By contrast with this work on the pervasive influence of narrative logic, the narrative features of judicial decisions have received little attention. Studies of narrative in courtroom discourse have touched on related issues, analyzing testimony and legal argumentation with respect to narrative person, express and implicit markers of attribution, and the like.¹⁷ Those discussions focus on speech, not writing, and they rarely ask how narrative devices relate to legal doctrine, as I propose to do here. One way to assess the significance of these techniques would be to show how perspective, tense, deixis, and narratorial visibility, for example, inflect and condition a decision’s doctrinal analysis.

¹⁴ Simon Stern, “The third party doctrine and the third person,” *New Criminal Law Review*, 16 (2013), 364–412 (2013); Karen Petroski, “Fictions of Omniscience,” *Kentucky Law Review* 103 (2015), 477–528.

¹⁵ Fish explains that an interpretation commands assent by showing a work to exhibit literary qualities “in a greater degree than had hitherto been recognized” (*Is There a Text in This Class?* (Cambridge: Harvard University Press, 1980), p. 351); the usual procedure is to find those qualities in hitherto overlooked details. For treatments of narrative coherence in law, see Bernard S. Jackson, “Narrative Theories and Legal Discourse” in Christopher Nash (ed.), *Narrative in Culture* (London: Routledge, 1990), pp. 23–50; Nancy Pennington and Reid Hastie, “A cognitive theory of juror decision making: The story model,” *Cardozo Law Review*, 13 (1991), 519–557; Neil MacCormick, “Coherence in legal justification” in Aleksander Peczenik et al. (eds.), *Theory of Legal Science* (Dordrecht: Springer, 1984), pp. 235–251. Though not always articulated in terms of narrative, the same ideas have been taken up by commentators on fact-finding more generally, see, e.g., Dan Simon, “A third view of the black box: Cognitive coherence in legal decision making,” *University of Chicago Law Review*, 71 (2004), 511–586.

¹⁶ Scholarship on evidence usually considers the story of the frame-up (and the difficulty of evaluating it) in terms of probability, not narrative, but these may be seen as different facets of the same problem. See, e.g., Ronald J. Allen and Michael S. Pardo, “The problematic value of mathematical models of evidence,” *Journal of Legal Studies*, 36 (2007): 107–140, 109–110; Lawrence H. Tribe, “Trial by mathematics: Precision and ritual in the legal process,” *Harvard Law Review*, 84 (1971), 1329–1393, 1363–1365.

¹⁷ E.g., Jiunn Lee, “Interpreting reported speech in witnesses’ evidence,” *Interpreting*, 12 (2010), 60–82; Elisabetta Cecconi, “Witness narratives in 17th century trial proceedings” in Nicholas Brownlee et al. (eds.), *The Language of Private and Public Communication in a Historical Perspective* (Newcastle upon Tyne, UK: Cambridge Scholars Publishing, 2010), pp. 245–262; Laura Wright, “Third person plural present tense markers in London prisoners’ depositions, 1562–1623,” *American Speech* 77 (2002), 242–263.

Because of limitations of space, I focus instead on a few theories that have been highly influential in the study of narrative, taken from Todorov, Ricoeur, and Barthes.

NARRATIVE AND THE TRIAL DECISION

From Trial to Judgment

Various forms of legal writing and explanation are imbued with narrative qualities – not to mention the many depictions of law in popular culture – but it is worth focusing specifically on judgments because they figure so prominently, for lawyers and for the public, as the law’s own means of justifying its conclusions and describing its operations. Numerous examinations of law and literature attest to the kinship between judgments and imaginative narratives, but these discussions rarely acknowledge the differences that constrain the analogy. One might say that judgments frustrate narrative desire, except that few readers of judgments even begin with the expectations that accompany a novel or a movie, and hence there is no desire to be frustrated. Judgments typically announce the conclusion in advance, and readers will often know the result at any rate, having seen it summarized elsewhere. The reader’s curiosity has to do with argumentative technique and evidentiary support, not narrative desire.

Even someone who comes to the recital of facts without any foreknowledge is unlikely to find it narratively engaging. The summary of facts, like the doctrinal analysis, does not tell a story for its own sake: it serves the purposes of argument, first by highlighting the details that will invite a particular doctrinal solution, then by pursuing the analysis that establishes the legitimacy of that solution. As commentators often stress, this means the facts are selected in light of the theory that will resolve the case. Just as important is that the *mode* of delivering the facts also reflects that goal. The recitation of facts therefore admits no space for the techniques that foster readerly engagement with fictional plots – techniques that offer direct access to a character’s mental state, or that hint vaguely at an upcoming setback, encouraging readers to speculate about the protagonist’s future. Judges write in anticipation of a skeptical reader, and they take the need for support as their primary consideration.¹⁸ The measured and laborious style elicits an attitude of readerly

¹⁸ Thus the judge, no less than the lawyers, presents a potentially adversarial narrative, “construct [ed] . . . [in] anticipation of one or more alternatives,” and open to being “contest[ed] . . . from

vigilance, militating against the immersive experience of fictional narrative, the experience of being “lost in a book.”

Indeed, the basic distinction between *sjuzhet* and *fabula* seems unproductive as a means of examining the decision’s factual narrative, because judges set out the events in a fashion that implies (through the use of tense, perspective, and chronology) that the story on offer simply *is* what happened, and there is no underlying story worth excavating and comparing. Only a naïve reader would accept that, considering the care that goes into crafting the recital; the point is not that anyone believes the decision represents the facts with mimetic accuracy, nor that anyone is being asked to believe that it does, but that the decision eschews any narrative techniques that would elicit another version of the story. Simply by virtue of appearing in such an elaborately processed text, even the plainest of factual narratives cannot help indexing its basis in some rawer material; it simply proposes no means of retrieving it. If *sjuzhet* refers to the effects of narrative artifice, then paradoxically, the judgment offers *sjuzhet* without a *fabula*. The judge has no reason to mark that difference, because it would only cast doubt on the decision’s legitimacy.

To be sure, the elaboration of facts has changed significantly over the last century and a half: before the mid-nineteenth century, courts gave those details sporadically and elliptically, and often without sequestering them at the outset. But the evolution of judicial narrative since then has not made the presentation narratively compelling. During the nineteenth century, Anglo-American law became increasingly concerned with exploring mental states as a means of solving various doctrinal problems;¹⁹ these developments had a significant effect on trial advocacy and the trial process (including the rules of evidence), but they did not lead judges to borrow or imitate novelistic devices for representing consciousness. Scholars who have considered the relations between legal decisions and various literary genres have pointedly refrained from analogizing literary and judicial *techniques* of representation (such as flashback and free indirect discourse), focusing instead on questions of rhetoric and structure.²⁰

a direction not anticipated by [the] narrative’s author.” James Phelan, “Narratives in contest; or, another twist in the narrative turn,” *PMLA*, 123 (2008), 166–175, 168.

¹⁹ Lisa Rodensky, *The Crime in Mind: Criminal Responsibility and the Victorian Novel* (New York, NY: Oxford University Press, 2003); Jonathan Grossman, *The Art of Alibi: English Law Courts and the Novel* (Baltimore, MD: Johns Hopkins University Press, 2002); see also Rex Ferguson, *Criminal Law and the Modernist Novel* (New York: Cambridge University Press, 2013).

²⁰ See, e.g., Robert Ferguson, “The judicial opinion as literary genre,” *Yale Journal of Law & the Humanities*, 2 (1990), 201–219.

If legal decisions offer so few of the pleasures that entice the enthusiasts of procedurals, thrillers, and courtroom novels, then why describe law as a narrative enterprise in the first place? Unlike judgments, trials (and the events leading up to them) abound in the features that make narratives absorbing. An unresolved conflict, for which the verdict will be an endpoint, arouses the narrative desires that a written decision would frustrate. Since their inception, trial advocacy manuals have extolled the power of a well-told story. A recent discussion emphasizes that lawyers are most effective when they “consciously . . . deploy the tools of the storyteller’s craft.”²¹ A handbook from 1901 recommended that lawyers study “the masters of narration,” who teach “the art of telling a story.”²² Nearly a century earlier, a commentator on lawyers’ forensic abilities observed that an effective barrister will turn “a long, complicated story, full of minute details,” into one that every audience member can easily follow.²³ These examples reflect the understanding that the trial process is a narrative process.

The trial’s narrative dimensions, however, are not equally visible to all observers. The narrative’s continuity depends on the participant’s perspective: the flow of any given witness’s testimony may be punctuated by the questions of the lawyer conducting the examination and the objections of the opposing counsel, who may succeed in cutting off a developing narrative array and leaving it entirely stranded. Just as the lawyers seek to capitalize on the narrative potential of their client’s case and witnesses, they seek to undermine the power of the narrative being organized on the other side. For the jurors and others in the audience, including the parties themselves, the flow of the testimony may be interrupted by private conferences between the judge and lawyers. Perhaps the best-known way to exploit the narrative potential that some participants glimpse only sporadically is to assemble the materials in a retelling of the trial, with a narrator who has access to all of these partial perspectives.²⁴ This way of managing conflict and point of view is not limited to courtroom fiction and “true crime” reportage: Alexander Welsh has argued that the trial furnishes a plot and a forensic approach to evidence that played a vital role in the development of the novel, most notably in Henry Fielding’s

²¹ Philip N. Meyer, *Storytelling for Lawyers* (New York, NY: Oxford University Press, 2013), p. 2.

²² George Rose, “Literature and the bar,” *Law Notes*, 5 (1901), 107–110, 110.

²³ John Payne Collier, *Criticisms on the Bar* (London: Simpkin, 1819), p. 159.

²⁴ For a bibliography of these retellings, see Steve Haste, *Criminal Sentences: True Crime in Fiction and Drama* (London: Cygnus Arts, 1997). For a discussion that usefully compares trial transcripts and modernist fiction, “which abandons the vulgar gratifications of omniscience in order to yield up . . . different voices . . . speaking for themselves,” see Steven Connor, “Transcripts: Law, literature and the trials of the voice,” *New Formations*, 32 (1997), 60–76, 67.

Tom Jones (1749).²⁵ Jonathan Grossman and Lisa Rodensky have shown how nineteenth-century fiction adapted and extended these ways of staging and resolving conflict.²⁶

In the movement from trial to judgment, narrative becomes subordinated to argument. Intermittently, perhaps, some vivid or dramatic moments will remain to be savored, like raisins in a pudding – and there is an understandable tendency to isolate those examples and to exaggerate their frequency. Because of the judgment's purpose, however, such moments (on the rare occasions when they occur) fit into a structure aimed at justification, not suspense or curiosity. A case is always a case of *something*, and while that something is open to respecification on appeal, at each juncture the court will concern itself with how the litigants' story fuels the legal one. A case of something is a member of a class, an example on its way to a place in a larger constellation that forms a rule, doctrine, or category, or that may become discernible as one of these. The legal ends, rather than the specific details, account for the case's significance from the judge's point of view.

Catherine Gallagher has suggested that one of the novel's founding justifications involved the claim that made-up characters, though highly individuated (and compelling to readers for that reason), could exemplify truths about general categories of persons.²⁷ The legal decision furnishes a telling contrast, in which the individual example tilts toward the generalization, allowing particular details to remain insofar as they facilitate an understanding of the dispute's legal contours. The facts are meant to demonstrate a general proposition, to exhibit an abstraction. That exemplary and demonstrative function bridges the story of the parties and the story of the law, accounting for how the former is narrated and how the latter brings both stories to an end.²⁸

THE DECISION'S PLOTS

As this discussion has been suggesting, we may think of the factual rendering and the legal analysis as different narratives, with different plots.²⁹ An important generic feature of the judgment involves the role of tense and plot as they

²⁵ Alexander Welsh, *Strong Representations: Narrative and Circumstantial Evidence in England* (Baltimore, MD: Johns Hopkins University Press, 1992).

²⁶ Grossman, *The Art of Alibi*; Rodensky, *The Crime in Mind*.

²⁷ Catherine Gallagher, "George Eliot: Immanent Victorian," *Representations*, 90 (2005), 61–74.

²⁸ For more on exemplarity and legal narrative, see Maksymilian Del Mar, "Exemplarity and narrativity in the common law tradition," *Law & Literature*, 25 (2013), 390–407.

²⁹ The requirement that U.S. federal trial courts must separate fact and law, formalized in 1935 in Federal Rule of Civil Procedure 52(a)(1), was borrowed from Equity Rule 70½, promulgated in 1929; see 281 U.S. 773 (1929). Scholarship on the two rules' histories has examined standards

bear on the factual summary and the ensuing legal analysis. Commentators have rightly emphasized the importance of the end-driven structure that guides the judgment's narrative trajectory,³⁰ but the components of this structure have received less attention. The judgment includes at least two overlapping narratives, with a conclusion that terminates both of them. A story about the parties, narrated in the past tense, gives way to a story about the law, narrated in the present tense. The litigants' story is assimilated to the legal one, meaning that the legal result resolves their conflict, but also that their conflict may become an event in the legal story. That is what it means to say that their dispute is a case "of something." This way of presenting and using the facts/analysis structure links the legal decision to other forms of case study – particularly the research article in the social sciences – and the treatment of narrative here may also have implications for some of these other varieties.³¹

The legal story may be a static one in which the precedents easily dispense with the litigants' conflict, or a dynamic one that requires the judges to draw on policy and analogy as they pit one doctrine against others or modify the law in some way.³² Todorov's account of the conditions required for the "minimal complete plot" helps to clarify this distinction. According to Todorov, a plot starts with a "stable situation which is disturbed," passes into a "state of disequilibrium," and eventuates in a new equilibrium that is "similar" but "never identical" to the first one.³³ The static (precedent-governed) legal story

of review in law and equity, but has not investigated judicial writing practices before these rules were adopted. A discussion from the late 1940s, however, suggests that trial judges often failed to comply with Rule 52; see "The law of fact: Findings of fact under the federal rules," *Harvard Law Review*, 61 (1948), 1434–1444, 1434–1436.

³⁰ E.g., Max Radin, "The theory of judicial decision: Or how judges think," *American Bar Association Journal*, 11 (1925), 357–362, 359; Jerome Frank, *Law and the Modern Mind* (New York: Brentano's, 1930), 101; Bruce Anderson, "Discovery" in *Legal Decision-Making* (Dordrecht: Kluwer, 1996), 30; Brooks, "Inevitable Discovery," 99.

³¹ See, e.g., Barbara Czarniawska, *Writing Management: Organization Theory as a Literary Genre* (New York, NY: Oxford University Press, 1999), pp. 69–70; John Swales, *Genre Analysis: English in Academic and Research Settings* (Cambridge, UK: Cambridge University Press, 1990), pp. 110–176; Mary S. Morgan, "Case studies: One observation or many? Justification or discovery?" *Philosophy of Science*, 79 (2012), 667–677.

³² On this contrast, see Frederick Schauer, *Thinking Like a Lawyer* (Cambridge, MA: Harvard University Press, 2009), 91. For a discussion of precedent in narrative terms, see Andrew Bricker, "Is narrative essential to the law? Precedent, case law and judicial employment," *Law, Culture & Humanities*, forthcoming.

³³ Tzvetan Todorov, *The Poetics of Prose*, trans. Richard Howard (Ithaca, NY: Cornell University Press, 1977), p. 11. Compare J. Hillis Miller's recipe: "[T]here must be . . . an initial situation, a sequence leading to a change or reversal of that situation, and a revelation made possible by the reversal of the situation." J. Hillis Miller, "Narrative" in Frank Lentricchia and Thomas McLaughlin (eds.), *Critical Terms for Literary Study*, 2nd ed. (Chicago, IL: University of

therefore lacks a plot, because the legal equilibrium remains the same throughout.

In most trial and appellate judgments, the text delineates a complete plot for the litigants' tale but not for the legal analysis that resolves it. These are not the cases we usually encounter, however, because such decisions find few readers beyond the parties themselves. The paradigmatic form appears in the unpublished "Memorandum Dispositions" of US federal appellate courts: these easily resolved cases feature a terse style, treating the law's application as entirely perfunctory. They often simply dispense with the facts.³⁴

We can appreciate the force of Todorov's definition by contrasting it with E. M. Forster's observation that a plot turns a mere chain of events into a causal sequence.³⁵ Forster's view finds a plot even in the static analysis that relies entirely on precedent, because legal reasoning always articulates causal relations: a doctrine causes a party's claim to succeed or fail. Todorov's view, on the other hand, suggests that a legal analysis guided by analogy is narratively distinguishable from one governed entirely by precedent. The latter poses no prospect of a threat to the doctrine's stability: it simply offers a demonstration of how the precedent operates. The cases that are anthologized in textbooks and treatises, and reported as news, feature the more complex legal story, in which both phases of the judgment have a complete plot. Those decisions also tend to carry other narratively significant features, because when judges perceive a need to modify the law, they ineluctably locate themselves as narrators in relation to the laws they seek to modify.

If the term "plot" seems to exaggerate the kind of activity that can be discerned in the abstractions of legal analysis, we might instead follow Ricoeur and call it "quasi-plot." In explaining the nature of the causal accounts that historians offer, Ricoeur likens historians to judges: "placed in the real or potential situation of a dispute, they [both] attempt to prove that one given explanation is better than another."³⁶ Historians do not "explain by recounting"; they proceed by "set[ting] up the explanation itself as a problem in order to submit it to discussion and to the judgment of an audience . . . composed first of all of the historian's peers" (1:175). This expectation of critical

Chicago Press, 1995), 66–79, 75. This definition imposes nearly the same requirements, and could be applied with much the same effect as Todorov's.

³⁴ Joseph L. Lemon, Jr., *Federal Appellate Court Law Clerk Handbook* (Chicago, IL: ABA, 2007), pp. 42–44.

³⁵ E. M. Forster, *Aspects of the Novel* (New York, NY: Harcourt, 1927), p. 130.

³⁶ Paul Ricoeur, *Time and Narrative*, trans. Kathleen McLaughlin and David Pellauer (Chicago, IL: University of Chicago Press, 1984), vol. 1, p. 175. Further references appear parenthetically.

scrutiny differentiates the historian from the literary narrator (and again recalls the judge's position): the novelist "expects from the public, in Coleridge's familiar expression, a 'willing suspension of disbelief,'" but "[h]istorians address themselves to distrustful readers who expect from them not only that they narrate but that they authenticate their narrative" (1:176). To succeed, Ricoeur writes, the historian's explanation must show why a course of events resulted from "a particular factor *rather than some other*" (1:186). The form of explanation that satisfies this requirement is one that straddles the line between logical proof (according to general laws) and "explanation by emplotment," which depends on understanding rather than on logical entailment (1:181). Ricoeur calls this "transitional structure," which achieves both purposes, "quasi-plot" (1:181), because by arranging matters causally so as to facilitate understanding, it achieves the same function as a literary plot, even though it applies to historical events rather than fictional ones.³⁷

In emphasizing that quasi-plot is bound up with "a process of argumentation," Ricoeur again likens historians to judges. Quasi-plot is predicated as argument, but not as matter-of-fact description, because historians "know that we can explain [the result] *in other ways*. They know this because, like a judge, they are in a situation of contestation and of trial, and because their plea is never finished" (1:186). These comments suggest that judicial opinions, even more than the writings of historians, traffic in quasi-plot. Ricoeur also hints at a reason for casting the legal analysis in the present tense. For lawyers, the obvious explanation is that doctrine continues to apply into the future;³⁸ to this, Ricoeur might add that the present tense can be a way of registering that the judgment's form is one of ongoing contestation.

³⁷ In contrast, Donald Polkinghorne argues that when an explanation refers to "an established law," it cannot be said to proceed "by means of a plot," even if it uses some narrative resources. He writes that when a demonstration refers to an established law, "[t]he power of explanation . . . comes from its capacity to abstract events from particular contexts and discover relationships that hold among all instances . . . irrespective of the spatial and temporal context," whereas "explanation by means of narrative is [always] contextually related." *Narrative Knowing and the Human Sciences* (Albany: SUNY Press, 1988), 21.

³⁸ George Coode makes the same point with respect to legislative language, observing that "the law [should] be regarded while it remains in force as *constantly speaking*." George Coode, *On Legislative Expression; or, The Language of the Law* (London: Benning, 1845), p. 63. Consequently, he adds, statutes should use the present tense for circumstances that the legislation covers, and the past tense for "facts precedent to its operation" (e.g., a prior conviction, where the legislation imposes penalties for second and later convictions). The result is that "[n]arration will appear in narrative language," rather than using the "imperious language" of a legislative command; to do otherwise is "to confound *the facts* and *the law*." *Ibid.*, p. 65. Coode thus suggests an approach that resembles the distinctions in tense for facts and law that we find in judgments.

Finally, Ricoeur complements the notion of quasi-plot with “quasi-character,” noting that “the role of character can be held by *whoever* or *whatever* is designated in the narrative as the grammatical subject of an action predicate in the basic narrative sentence ‘X does R’” (1:197). In historical writing, quasi-character embraces “peoples, nations, [and] classes” (197); in the quasi-plot of the legal analysis, it embraces doctrines, judges (insofar as they take responsibility for making a choice), and also policies and principles – that is, any agents that contribute to the quasi-plot’s development. In this way, the legal analysis becomes eligible for the same kinds of questions that we put to fictional stories, such as questions about how the reader is positioned in relation to the characters, which characters are allowed to interact with each other, what kind of information is rendered inaccessible, and why some details are presented directly and others at second-hand. The answers might suggest new ways of seeing legal decisions in terms of genre, and new ways of understanding how certain kinds of problems evoke narrative tendencies that confuse the law instead of clarifying it. One of the most salient problems for any narrative that aims at belief as well as persuasion involves the means of establishing the narrator’s authority, and I turn now to one aspect of this question, by considering some legal analogues of Barthes’ “reality effect.”

THE REALITY EFFECT IN LAW

As we have seen, the potential narrative appeal that circulates before and during the trial diminishes in the course of adjudication. The movement from conflict to litigation to resolution tracks a process in which the participants select certain details to describe to their lawyers, the lawyers select certain details to present in court, and the judge selects certain details to set out in the judgment – each time in accord with the argumentative purpose at hand. Barthes famously observed that the unmotivated detail, the detail that cannot be “assign[ed] . . . a place in the structure,” creates the “effect of the real”: “such notations . . . seem to be allied with a kind of narrative *luxury*, lavish to the point of offering many ‘futile’ details and thereby increasing the cost of narrative information.”³⁹ Yet we revel in those details, Barthes explains, because they “denote what is ordinarily called ‘concrete reality.’” Their apparent futility is itself their justification: if no other purpose is served by mentioning the detail, then it must have been included simply because that is

³⁹ Roland Barthes, “The reality effect” (1968) in *The Rustle of Language*, trans. Richard Howard (New York, NY: Hill & Wang, 1986), pp.141–148, 141.

how “it really happened.”⁴⁰ In the legal pattern just described, the reality effect dwindles because the details become increasingly motivated at each step, as the legal rationales come increasingly to control every aspect of the presentation, such that it would be a generic flaw if the decision included unmotivated details, or lacked sufficient details to motivate the conclusion.⁴¹ The hostility toward useless details in legal writing finds expression in the demand for narrative coherence, mentioned earlier; hence, in the course of the trial, a theory of the case that can redeem some of Barthes’s “futile” details will be preferred to one that cannot, and to that extent those details may find their way into the decision, now with their purpose fully evident.

In a sense, any detail that appears at the threshold of legal visibility is potentially motivated; after all, the client’s very reason for consulting a lawyer is to consider the advisability of suing, and that purpose informs whatever the client has to say. But that narrative of events nevertheless exhibits some of Barthes’s luxury, because although the details cannot be regarded as raw, they have not yet been professionally edited with the aid of doctrinal logic. Moreover, any lawyer who understands how to establish the credibility of a witness will be intent on eliciting some unmotivated details in the course of testimony, for the very reason that Barthes gives: nothing attests to a person’s veracity like the trivial point that gets mentioned just because the witness happens to remember it. Again, a lawyer’s trial narrative, despite the craft that goes into shaping it, remains experimental and tentative; no one knows which of the details on offer will survive the objections and proof contests that might eliminate them, nor which of the remaining ones the judge will include in the factual summary. By contrast, the judge’s decision erases the stray marks punctuating the pleadings and evidence, selects the cognizable claims and supporting arguments, and organizes relevant detail to suit the legal framework being imposed on the case.

The increasing focus on matters of policy and doctrine, as a case is transformed from live dispute to written resolution and then travels up the appellate ladder, suggests a kind of economy of narrative energy in the adjudicative process. In the earlier stages, when it remains unclear which facts will matter, there is a proliferation of narrative energy as the parties enlist witnesses, gather

⁴⁰ *Ibid.* p. 146.

⁴¹ For an instance of the latter, consider Justice White’s complaint that a draft opinion was “as unsatisfying as . . . a bad mystery novel” because the analysis had not paved the way for the proposed doctrinal solution: “[W]e learn on the last page that the victim has been done in by a suspect heretofore unknown, for reasons previously unrevealed.” Quoted in Richard Sherwin, “Law frames: Historical truth and narrative necessity in a criminal case,” *Stanford Law Review*, 47 (1994), 39–83, 66.

documentary evidence, and consider the various storylines that may result in a legal victory. Some alternatives, and the details that would have supported them, get rejected before the trial, and others are excised in the course of the trial as the judge applies exclusionary rules, the opposing counsel's evidence forecloses certain options, and the lawyers make strategic decisions on the fly.

As the adjudication begins to find textual expression, this energy diminishes. Once the judge has reduced the dispute to writing, most of the teeming narrative energy will be purged from the facts, in a text that enlists them for argumentative purposes. On appeal, the facts may be further pared away. Trial decisions, for example, typically include enough facts to support any of the alternative theories that might justify the judge's conclusions, whereas appellate decisions, zeroing in on a particular doctrinal issue, can be sparer of the operative facts. As narrative energy is leached out of the dispute's factual arena, some of it migrates to the legal analysis, though in a significantly altered form. As noted above, the active agents in that section, which perform the work and may come into conflict or undergo change, are primarily doctrines, not human actors. The judges themselves may figure as both narrators and actors, depending on whether they present the result as compelled by law or deliberately chosen after weighing the alternatives. The narrative energy on display in the analysis is typically subdued, by contrast with the energy that circulates before the trial. Thus the economy does not simply transpose narrative energy from one arena to another: much of it dissipates. Barthes' concept thus offers a useful means of understanding the gestures toward realism that occur during the trial and their transformation in the course of the litigation process.

Although the reality effect is notably absent from the trial and appellate judges' decisions, they offer an analogue, which we might call the "legality effect." If the reality effect in fiction indexes the text's veracity, by the same token it indexes the narrator's reliability or authority. The text that can record "unnecessary" information is a text with access to a wealth of detail; it is a text produced by someone who knows more than the page records. (One could imagine the reality effect in the hands of an unreliable narrator, but if so, the "unnecessary" details would turn out to be motivated after all, serving to make us doubt their accuracy and to look askance at the narrator.) Just as the reality effect testifies to the narrator's comprehensive knowledge about the world of the fiction, the legality effect may serve a parallel function in the analytical part of the judgment.

Despite the earlier suggestion that the unneeded legal detail is regarded as a generic flaw, legal analysis often abounds in unneeded details. For example,

courts often opine on matters not strictly before them (which critics characterize as *dicta*) and recite far more doctrine than the case at hand requires, giving mini-lectures in a particular area of law rather than homing in on the legal issues at hand. These gestures are indeed greeted as “increasing the cost of narrative information,”⁴² but one may suspect that just as novelists include “futile” details with full awareness of their futility, judges are equally conscious of the demands of the form and are equally deliberate in their efforts. In the early modern period, when the common law was understood as having a separate existence independent from the judges’ pronouncements, such material might have served an analogous purpose: elaborating unnecessary doctrinal points could be a way to underscore the text’s legal veracity and the judge’s comprehensive legal knowledge, affirming his status as an “oracle of the law.”

Although contemporary lawyers do not hold the same views about the law’s source, the same implications concerning knowledge and authority may nevertheless apply. Formulated in narrative terms, the legality effect reinforces the judge’s status as an omniscient narrator with respect to the legal doctrines. That effect reinforces the conventionally omniscient mode that governs the legal analysis, a mode akin to the confident omniscience associated with the Victorian novel. In fictional narratives, various devices – including the reality effect – conspire to create a narrator with privileged access to the characters’ histories, thoughts, and motives; correspondingly, the judgment sets up a judicial narrator who can speak confidently about the doctrines’ origins, purposes, and limits – a narrator who, by pronouncing that a doctrine serves a particular function, makes it so. The judge’s account is inevitably open to challenge, as we noted when considering Ricoeur’s quasi-plot, but that simply means that the judge’s confidence may prove unwarranted; here we are concerned with how the judgment creates this authority, not with its ability to withstand attack from other judgments, which will use the same techniques to establish their own authority, in turn.

The decision’s doctrinal surplusage exhibits “the legal” for the reader, just as the novel’s excessive description exhibits “the real.” By including legal information that does not form part of a contention, the judge furnishes the reader with a reassuringly accurate and familiar framework to enfold the motivated propositions that constitute the argument. The incontestably true legal details are there to vouch for the soundness of the assertions that follow. Moreover, just as the reality effect has taken on new manifestations over the last century (involving, for example, the use of photographs and other kinds of

⁴² Barthes, “The reality effect,” p. 141.

documentation and pseudo-documentation),⁴³ so too has the legality effect. During roughly the same period, it became conventional, in American judicial writing, to suffuse the judgment's analytical section with short quotations from a wide array of decisions, in order to validate every single proposition, including those that are so well-accepted as to be banal. Conversely, Canadian judgments developed a tendency to quote other decisions at great length, sometimes amounting to two or three pages at a time, including several levels of nested quotations – and then to make little if any further reference to quoted material. In both cases, the gesture often does nothing to advance the analysis but emphatically attests to the judges' doctrinal fluency. By examining the judgment through the lens of narrative technique, we can find an explanation – if not quite a justification – for what otherwise seems to be a waste of space and a tax on the reader's patience.

Once we consider judgments as having distinctive traits, rather than treating them as interchangeable with the forms of imaginative writing that use plot and character to entice and entertain us, the most fundamental questions in the study of narrative take on new potential. Instead of assuming, without discussion, that the decision's plot corresponds to a novelistic one, we gain the ability to study the problem directly and to distinguish among legal plots. Because this approach has implications for the decision's mode of reasoning and doctrinal conclusions, it raises questions not only for scholars of law and literature (and particularly those who study "law as literature") but also for legal scholars more generally.

⁴³ For some particularly relevant examples, see Todd Herzog, "Crime stories: Criminal, society, and the modernist case history," *Representations*, 80 (2002): 34–61, which appears in revised form as the second chapter of his book *Crime Stories: Criminalistic Fantasy and the Culture of Crisis in Weimar Germany* (New York, NY: Berghahn, 2009).